Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARTECH USA, INC.,
Petitioner,

v.

GIL HOEFLICH,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In defining Jones Act status, what is the scope of employment, or work assignments, that must be considered in determining the "substantial connection" requirement for seaman status under *Chandris, Inc. v. Latsis,* —— U.S. ——, 115 S. Ct. 2172 (1995), the one issue remaining unresolved after *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991), and *Chandris, Inc. v. Latsis,* —— U.S. ——-, 115 S. Ct. 2172 (1995)?

Is it (a) all of the assignments during the course of Respondent's employment with Petitioner, as Petitioner contends; or (b) only the assignment at the time of the injury, as Respondent contends; or (c) the assignment at the time of the injury, together with future assignments which Respondent might have expected, as the Court of Appeal held?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal of the State of California, First Appellate District ("Court of Appeal") are as follows: Gil Hoeflich, plaintiff, appellant, and Respondent herein; Martech USA, Inc., defendant, respondent, and Petitioner herein.

The following were also parties to the proceeding in the Superior Court of California for San Francisco County ("trial court") but not in the Court of Appeal: Martech International, Inc. was dismissed prior to trial pursuant to agreement of tne parties. The trial court directed a verdict in favor of defendants Morrison Knudsen Corporation, Manson Construction & Engineering Company, and Point Loma Constructors, a Joint Venture Between Morrison Knudsen Corporation and Manson Construction & Engineering Company, and final judgment was entered in their favor. No appeal was taken from that final judgment.

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES (RULE 29(6))

There is no parent company or nonwholly owned subsidiary of Petitioner Martech USA, Inc.

Martech USA, Inc. is a chapter 7 debtor in bankruptcy in the United States Bankruptcy Court for the District of Alaska, which lifted the automatic stay for purposes of this action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No.

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

---

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, which held that Respondent is a seaman (crewmember) covered by the Jones Act, 46 U.S.C. App. § 688, because Respondent's work assignments at the time of his injury, together with future work assignments which he might have expected had he not been injured, constitute a connection to a vessel in navigation that is substantial in terms of its duration and nature. Appendix, at 2a.

This Court, in recent decisions, has clarified all but one of the elements of seaman status. In *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991), this Court held that the first prong of the test for seaman status requires that an employee contribute to the mission of the vessel, and not merely to its transportation function. In *Chandris, Inc. v. Latsis,* —— U.S. ——, 115 S. Ct. 2172 (1995), this Court held that the second prong of the test for seaman status requires that an employee have an employment-related connection to a vessel in navigation that is substantial in terms of its duration and nature. In *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187 (1952), this Court considered what constitutes a vessel in navigation.

Left unresolved is only one issue, the scope of employment that must be considered in determining the substantial connection requirement of *Latsis. Papai v. Harbor Tug & Barge Company,* 67 F.3d 203 (9th Cir. 1995), *cert. granted, Harbor Tug & Barge Company v. Papai,* —— U.S. ——, 117 S. Ct. 36 (1996), involves the scope of employment that must be considered where there are multiple employers. The present case involves the scope of employment that must be considered where there is a single employer. Here, the parties and the Court of Appeal adopted three positions on this issue; the Ninth Circuit in *Papai* adopted a fourth. The present case provides the Court an opportunity to complete its definition of seaman status.

THE OPINIONS AND ORDERS ENTERED IN THE CASE ARE UNREPORTED

1. The Final Judgment of the Superior Court of California for the County of San Francisco, entered on October 20, 1995, on the court's Order Granting Motion for Judgment Notwithstanding the Verdict and, in the Alternative, Conditionally Granting Motion for New Trial ("JNOV"), is unreported. It appears in the Appendix, at 15a.

2. The decision and opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, filed July 23, 1996, is unpublished, by order of the court. It appears in the Appendix at 2a.

3. The decision of the Supreme Court of California denying the Petition for Discretionary Review in *Gil Hoeflich v. Martech USA Incorporated*, S055885, appears at 1996 Cal. LEXIS 5808 (Oct. 16, 1996) and in the Appendix, at 1a.

BASIS FOR JURISDICTION

The order of the Supreme Court of California denying Petitioner's Petition for Discretionary Review was entered on October 16, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The final decision was rendered by the Court of Appeal, the highest court of the State of California which rendered a decision on the merits, the Supreme Court of California denying the Petition for Discretionary Review. Rights, privileges, or immunities are claimed under a statute of the United States, namely, the Jones Act, 46 U.S.C. App. § 688.

STATUTES INVOLVED IN THIS CASE

The statute involved in this case is the Jones Act, 46 U.S.C. App. § 688, set out in the Appendix, at 39a. Petitioner contends that jurisdiction over Respondent's claim lies in the Department of Labor under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and not in the courts under the Jones Act.

STATEMENT OF THE CASE

This personal injury action was brought against Petitioner, the diving contractor on a San Diego sewer outfall project, by Respondent, its employee, who, in his own

words, "shot [him]self in the foot" (Appendix, RT 432, lines 20-23) with a high pressure water gun during a dive on the project. On the day of his injury, Respondent was assigned to the ARCTIC CAROLYN, a vessel owned and operated by Petitioner, which transported Respondent to the construction dive site off the coast of California and supported dive operations. Respondent's claim against his employer is governed either by the LHWCA, and is an administrative claim within the jurisdiction of the United States Department of Labor, or is governed by the Jones Act, and is a claim within the jurisdiction of state and federal courts. Although the claims are mutually exclusive,[1] Respondent brought claims under both, a claim under the LHWCA in the administrative forum (still pending), and a claim under the Jones Act[2] in the trial court (this action).

There is no dispute that the law provides compensation to Respondent for an injury. The only dispute is whether Respondent's claim is governed by the LHWCA and within the jurisdiction of the Department of Labor (Petitioner's position, adopted by the trial court), or governed by the Jones Act and the general maritime law and within the jurisdiction of the state court (Respondent's position, adopted by the Court of Appeal). The choice is resolved by a determination of "seaman status": If Respondent is not a "seaman," his claim is properly in the Department of Labor. If Respondent is a "seaman," his claim is prop-

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[1] The LHWCA covers maritime employees, but expressly excepts crewmembers covered by the Jones Act. 33 U.S.C. § 902(3)(G).

[2] Respondent's complaint contained causes of action for negligence under the Jones Act; unseaworthiness, a strict liability cause of action against a vessel owner, a cause of action created by the general maritime law, a body of federal common law; maintenance and cure, causes of action against an employer for meals and lodging and for medical treatment to the point of maximum cure. All of these causes of action accrue in favor of a "seaman." Thus, the issue of "seaman status" is common to all these causes of action and determines whether these causes of action have merit.

erly in the state court. Whether Respondent is a seaman is determined, for purposes of this case, by the scope of employment, or work assignments, that must be considered in determining seaman status. This issue, together with the related issue in *Papai*, is the one issue left unresolved by this Court's recent decisions on seaman status.

The federal question, the applicability of the Jones Act, was raised in the Complaint, which invoked it. Petitioner also raised the question of the applicability of the Jones Act in the trial court in its motion *in limine*, which the court denied, without prejudice; in its trial brief; through evidence introduced at trial, *see, e.g.*, portions of the trial transcript reproduced in the Appendix; in Petitioner's motion for a directed verdict, denied by the court; and in Petitioner's post-trial motions for JNOV and for a new trial. The trial court granted Petitioner's motion for JNOV, holding that Respondent was not a seaman covered by the Jones Act. Order Granting Motion for Judgment Notwithstanding the Verdict and, in the Alternative, Conditionally Granting Motion for New Trial, in Appendix, at 15a.

The federal question was the subject of the assignments of error in Respondent's appeal, taken from the JNOV in Petitioner's favor, and Petitioner's cross-appeal, taken from the "Judgment on Special Verdict."

The Court of Appeal reversed, believing, contrary to the rule established by this Court, that the required substantial connection to a vessel in navigation could be found by considering the work assignments which Respondent might have expected in the future, known as the "expectant seaman" doctrine:

> There was evidence here that plaintiff had a connection substantial in duration and nature to the *Arctic Carolyn* and other identifiable vessels in navigation. His assignment to the San Diego sewer project *was*

expected to last approximately one year, with dives from the Arctic Carolyn and two seagoing barges.

Decision of the Court of Appeal, Appendix, at 2a (emphasis added).

The federal question, in particular the "expectant seaman" doctrine, was the subject of Petitioner's petition for rehearing in the Court of Appeal, which denied it without opinion. Appendix, at 12a.

The federal question was the subject of Petitioner's Petition for Discretionary Review in the Supreme Court of California, which denied the Petition without opinion. Appendix, at 1a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEAL DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT: *DESPER v. STARVED ROCK FERRY COMPANY, CHANDRIS, INC. v. LATSIS,* AND *McDERMOTT INTERNATIONAL, INC. v. WILANDER*

A. *Desper v. Starved Rock Ferry Company* and the "Expectant Seaman" Doctrine

The Court of Appeal relied on a theory rejected by this Court. The future assignments, which an employee might expect after his accident, may not be considered in determining seaman status. *Desper v. Starved Rock Ferry Company*, 342 U.S. 187, 191 (1952) (the Jones Act "does not cover probable or expectant seamen but seamen in being. . . . 'The fact that [an employee] had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature.' "). This rule has become entrenched as a rejection of the "expectant seaman" doctrine. A reason for the rejection is the impropriety of considering events

which might have but did not occur, a set which is very large and uncertain.

Thus, the decision of the Court of Appeal conflicts with relevant law established by this Court.

B. *Chandris, Inc. v. Latsis* and the Substantial Connection Requirement for Seaman Status

The test whether an employee is a seaman or not, a question of federal law, has been largely settled by several recent decisions of this Court. The test has two parts:

> [1] the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and
>
> [2] the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

Chandris, Inc. v. Latsis, —— U.S. ——, 115 S. Ct. 2172 (1995). It "is not the employee's particular job that is determinative, but the employee's connection to a vessel" that is determinative. *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 354 (1991).

Thus, this Court's decision in *Latsis,* —— U.S. ——, 115 S. Ct. at 2190, required Respondent to prove that a substantial portion of the time he worked for Petitioner was spent aboard vessels in navigation owned or operated by Petitioner. The Court of Appeal invoked the wrong test when it considered Respondent's future assignments. Respondent invoked the wrong test when he offered evidence relating to one assignment alone:

> Mr. Hillsman: In my view, the cutoff is the plaintiff's assignment at the time of the accident. In this circumstance we take the position a Jones Act seaman's status sinks or swims with assignment at the time of the accident.

RT 934-35, in Appendix, at 33a. The test invoked by Respondent is known as the "voyage test," a test expressly rejected by the Supreme Court in *Latsis* ("we must reject the initial appeal of . . . a 'voyage' test and undertake the more difficult task of developing a status-based standard").

Petitioner, on the other hand, urged the test adopted by this Court in *Latsis,* —— U.S. ——, 115 S. Ct. at 2190, that Respondent's entire employment with Petitioner be considered, and offered evidence of Respondent's assignments throughout his employment with Petitioner. That evidence shows that Respondent did not have the required connection to a vessel in navigation. For example, Exhibits E-1 and E-2, Appendix, at 25a, 26a, show that Respondent dived primarily from piers, beaches, surfboards, dams, and fixed platforms. Respondent testified that the "great majority" of his dives for Petitioner were not from an identifiable vessel or group of vessels owned or controlled by Respondent. RT 951, lines 13-26, in Appendix, at 34a. The record shows Respondent is not a seaman because far less than 30 percent of his dives, a touchstone for showing the required connection,[3] were from a vessel. RT 259, 1280, in Appendix, at 28a, 35a; CT 165-66 in Appendix, at 38a.

Thus, Petitioner and the trial court applied the correct rule for the employment-related connection required for seaman status. The Court of Appeal applied a rejected rule.

C. *McDermott International, Inc. v. Wilander* and the Rejection of an Employee's Particular Job as Determinative of Seaman Status

The Court of Appeal's opinion, at 5-6, Appendix, at 2a, cites cases involving divers to support its conclu-

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[3] This Court recognized that the courts "have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Latsis,* 115 S. Ct. at 2191.

sion that Respondent is a seaman. Doing so is in conflict with this Court's decision in *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 354 (1991), reaffirmed in *Latsis,* that "it is not the employee's particular job that is determinative, but the employee's connection to a vessel." Thus, to ask whether divers are seamen is to ask the wrong question. Sometimes they are and sometimes they are not.[4] Whether they are turns on the nature and duration of their connection to a vessel. Under the Supreme Court's decisions in both *Wilander* and *Latsis,* plainly a diver cannot *per se* be a Jones Act seaman.

Thus, the Court of Appeal's decision conflicts with no fewer than three relevant decisions of this Court. Petitioner respectfully submits that this Court should grant this Petition because the doctrine of *stare decisis*—that courts are guided by "fixed principles" and "impersonal rules of law," and not mere "personal impressions" of judges—is a question of the first importance. *Brown v. Allen,* 344 U.S. 433, 532, 535 (1953) (Jackson, J., concurring).

II. THE COURT OF APPEAL DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS IN *HEISE v. FISHING COMANY OF ALASKA, INC.* AND THE SIXTH CIRCUIT COURT OF APPEALS IN *ANTUS v. INTEROCEAN S.S. COMPANY*

The Court of Appeal applied a rule directly in conflict with that applied by the Ninth and Sixth Circuit Courts of Appeals, the rule rejecting the "expectant seaman" doctrine. *Heise v. Fishing Company of Alaska, Inc.,* 79 F.3d 903, 906 (9th Cir. 1996) ("The fact that *if* [plaintiff] performed well he *might* be hired to work on the

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[4] Petitioner's briefs cited cases, antedating *Latsis,* which held that divers were not seamen. Respondent's Brief in the Court of Appeal, at 6; Cross-Appellant's Brief in the Court of Appeal, at 6.

ship when it left Seward *if* there were jobs available does not change his land-based status at the time the injury occurred."); *Antus v. Interocean S.S. Company*, 108 F.2d 185, 187 (6th Cir. 1939) ("The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature."). *See also Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84, 87 (N.D. Cal. 1978) ("plaintiff's assertions that . . . he intended to resume [seaman status] at some point in the future, even if true, do not determine the issue before this Court [seaman status]"); *Sullivan v. American President Lines, Ltd.*, 206 F. Supp. 547 (N.D. Cal. 1961) ("The mere fact that Sullivan . . . might have become a 'crew member' some time after his injury is immaterial here").

Maritime law, which affects national and international maritime commerce, is a creature of federal law, and requires uniformity in its interpretation. The conflict created by the Court of Appeal should be reversed.

III. THE COURT OF APPEAL DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT AND WHICH IN RELATED FORM IS BEFORE THIS COURT THIS TERM

This Court has not decided, since its decision in *Latsis*, the scope of employment that a court should consider in determining the substantial connection requirement of seaman status. That question could usefully be answered in this case, where there is a detailed record showing Respondent's work assignments during his employment with Petitioner.

Respondent tried his case on the basis of the "voyage test", expressly rejected by this Court in *Latsis*. See Part I(B) *supra*. Petitioner tried this case on the theory that the relevant employment-related connections to vessels in navigation included Respondent's assignments throughout

his employment with Petitioner. Those assignments show that Respondent did not have the substantial connection to a vessel required by this Court in *Latsis*. See Part I(B) *supra*.

The Court of Appeal took yet a different tack, and held that the relevant employment-related connections to vessels in navigation included the assignment at the time of injury, together with the future assignments which Respondent might have expected. This is the "expectant seaman" doctrine, rejected by this Court as shown in Part I(A) *supra*.

The Ninth Circuit Court of Appeals, in *Papai v. Harbor Tug & Barge Company*, 67 F.3d 203 (9th Cir. 1995), review of which was granted by this Court on October 1, 1996, *Harbor Tug & Barge Company v. Papai*, —— U.S. ——, 117 S. Ct. 36 (1996), held that the relevant employment-related connection to vessels in navigation could be established by considering a plaintiff's work assignments not only with his employer at the time of his injury, but with multiple employers. This decision is at odds with Jones Act precedent, and with common sense. For example, this Court has approved an analysis based on vessel-related employment as a proportion of all employment with a defendant employer, with less than 30 percent not satisfying the requirement. See *Latsis*. An employer, who must select insurance coverage for its anticipated risks, cannot identify its risks and therefore the coverage it requires when doing so turns on its employees' assignments with other employers. A similar difficulty occurs under the rule of the Court of Appeal in this case: the proportion of vessel-related assignments, if it is a proportion of the assignment at the time of injury together with future assignments which do not occur, cannot be determined. Petitioner does not advocate a bright-line test, but the Court of Appeal's test provides no identifiable line at all.

Thus, the scope of employment which a court must consider in determining seaman status is before this Court this term. Clarification of the substantial connection requirement of this Court's decision in *Latsis* is important to the jurisdictional balance, and to the burden which uncertainty imposes on scarce judicial resources and on the decisions which maritime employers and employees face. Without clarification, injured employees must file duplicative claims to avoid the risk of choosing the wrong forum, employers must carry duplicative insurance, and courts variously alter the jurisdictional balance struck by Congress in enacting the LHWCA and the Jones Act.

CONCLUSION

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari so as to establish a uniform rule on the scope of employment which must be considered in determining seaman status under the Jones Act, and to resolve the conflicts set forth herein.

Respectfully submitted,

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January 14, 1997

APPENDIX

APPENDIX

[Filed Oct. 16, 1996]

IN THE SUPREME COURT OF CALIFORNIA

S055885

GIL HOEFLICH,

Appellant

v.

MARTECH USA INCORPORATED,

Appellant

And Companion Case

First Appellate District, Division Five,
No. A069336/A072913

Appellant's petition for review DENIED.

/s/ George
Chief Justice

[Filed July 23, 1996]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

A069336, A072913

GIL HOEFLICH,
Plaintiff and Appellant,

v.

MARTECH USA, INC.,
Defendant and Appellant.

(San Francisco County
Super. Ct. No. 950673)

Plaintiff Gil Hoeflich appeals a judgment notwithstanding the verdict (JNOV) entered in favor of defendant Martech USA, Inc., in plaintiff's personal injury action. He also appeals an alternative order granting a new trial conditioned upon his consent to a reduction of damages. In a protective cross-appeal defendant appeals the judgment on special verdict in favor of plaintiff that preceded the JNOV. We reverse and remand as set forth below.

BACKGROUND

Defendant subcontracted to perform all underwater diving services for an undersea sewer extension project

of the City of San Diego,[1] and plaintiff was a commercial diver employed by defendant. Sometime before plaintiff was assigned to work on the project, defendant had anchored its tugboat, the *Arctic Carolyn*, two and one-half miles offshore to hold her motionless directly above the terminus of the sewer outfall. Prior to this assignment plaintiff did the majority of his diving from nonvessels or vessels not owned by defendant. On his first dive in conjunction with this project, plaintiff struck and severely injured his left foot with a "water blaster" tool.

Plaintiff's complaint contained six causes of action: (1) negligence under the Jones Act (46 U.S.C., Appen. § 688); (2) unseaworthiness under general maritime law; (3) entitlement to maintenance and cure under general maritime law; (4) vessel owner negligence under the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. § 901 et seq.); (5) peculiar risk under state law; and (6) general contractor negligence under state law. By special verdict the jury found (1) plaintiff was a Jones Act seaman; (2) defendant was negligent under the Jones Act; (3) defendant's Jones Act negligence was a legal cause of plaintiff's damages; (4) the *Arctic Carolyn* was unseaworthy; (5) the vessel's unseaworthiness was a legal cause of damage to plaintiff; (6) defendant was not negligent as a vessel owner; (7) there was comparative negligence on plaintiff's part; and (8) plaintiff's comparative negligence was a legal cause

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[1] The contract for the sewer project was awarded to Point Loma Constructors (PLC), a joint venture between the Morrison-Knudsen Corporation (M-K) and the Manson Construction & Engineering Company (Manson). PLC, M-K and Manson were all defendants at trial, but at the conclusion of the parties' cases the court directed a verdict in their favor. The directed verdict is not at issue in this appeal.

Nine months after plaintiff filed his complaint, defendant filed a petition for bankruptcy. The bankruptcy court granted plaintiff relief from the automatic stay so he could proceed with this case.

of his damages. The jury found that plaintiff sustained total damages of $1,753,944, and allocated $634,944 to lost earnings, $119,000 to future medical expenses, and $1,000,000 to pain and suffering. It apportioned 75 percent of fault to defendant and 25 percent to plaintiff.

After the court entered judgment on the special verdict, defendant moved for JNOV on the ground of insufficient evidence that plaintiff was a Jones Act seaman. Alternatively, it moved for new trial on the grounds of procedural irregularities during trial, excessive damages, accident or surprise, and verdict against the law.

The court issued an order granting JNOV on the ground that plaintiff was not a Jones Act seaman, insofar as he was not a member of the crew of a vessel in navigation when he was injured. Specifically, it found that "Although the *Arctic Carolyn* was a tug capable of ocean navigation, she was out of navigation and was moored, with the sole mission of serving as a dive platform, before plaintiff boarded her. That mission could equally well have been performed by a barge incapable of navigation. If plaintiff had been injured while helping the tug to move to its destination or to anchor there, Jones Act status would have been evident even though plaintiff was a diver rather than a member of the ship's company. But the tug was out of navigation before plaintiff arrived, and he did not further the tug's mission of providing a dive platform. Rather, he undertook his own different mission of working on the ocean floor."

The court also issued an alternative order conditionally granting a new trial on the ground of excessive damages, unless plaintiff consented to a reduction of $500,000 in noneconomic damages and a reduction of lost earnings by the amount defendant had already contributed thereto.

DISCUSSION

I

Plaintiff's principal contention is that the JNOV was improperly granted because there was sufficient evidence of his seaman status to permit recovery under the Jones Act.

In ruling on a motion for JNOV the trial court cannot weigh the evidence or determine the credibility of witnesses; it must view the evidence in the light most favorable to the verdict, giving the prevailing party the benefit of any conflicts in the evidence and drawing all reasonable inferences in support thereof. (*Hauter* v. *Zogarts* (1975) 14 Cal.3d 104, 110.)

The Jones Act provides a negligence action in either state or federal court for "any seaman" injured "in the course of his employment." (46 U.S.C., Appen. § 688(a); *Soucie* v. *Trautwein Bros.* (1969) 275 Cal.App.2d 20, 24.) However, the Jones Act does not define the term "seaman," a fact which has resulted in considerable litigation over the meaning of that term. (See, *e.g.*, *Chandris, Inc.* v. *Latsis* (1995) 515 U.S. —— [132 L.Ed.2d 314; 115 S.Ct. 2172; *McDermott International, Inc.* v. *Wilander* (1991) 498 U.S. 337 [112 L.Ed.2d 866; 111 S.Ct. 807].)

Chandris is the most recent attempt by the United States Supreme Court to define which maritime workers are seamen. In *Chandris* the court noted that not all maritime workers are eligible for Jones Act protection. "[T]he Jones Act inquiry is fundamentally status-based: land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore." (*Chandris, supra,* 132 L.Ed.2d at pp. 332-333.) "[T]he ultimate inquiry is whether the worker in ques-

tion is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." (*Chandris, supra,* 132 L.Ed.2d at p. 338.)

Chandris announced a two-pronged test for determination of seaman status under the Jones Act: (1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation, or to an indentifiable group of such vessels, that is substantial in terms of both its duration and its nature. (*Chandris, supra,* 132 L.Ed.2d at p. 337.) *Chandris* emphasized that the purpose of the second requirement was to "[S]eparate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." (*Ibid.*)

Plaintiff clearly satisfies the first *Chandris* requirement. As observed in *Wallace* v. *Oceaneering Intern.* (5th Cir. 1984) 727 F.2d 427, 436: "A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not . . . an art developed in land work and transposed to a marine setting." (Italics original; see also, *Pickle* v. *International Oilfield Divers, Inc.* (5th Cir. 1986) 791 F.2d 1237; *Hall* v. *Professional Divers of New Orleans* (E.D. La. 1994) 865 F.Supp. 363.) The *Arctic Carolyn's* mission was to support divers performing work on the underwater sewer outfall, and plaintiff's work as a diver was essential to that mission.

The dispositive inquiry here is whether plaintiff meets the second *Chandris* prong, i.e., whether his connection to the vessel from which he was diving at the time of his injury was sufficiently substantial in terms of both its duration and nature to afford him Jones Act protection.

Chandris did not provide a bright line for the second prong of its seaman test, but did hold that the test for seaman status is a mixed question of law and fact, and if reasonable persons applying the correct legal standard could differ as to whether the employee was a member of the crew, it is for the fact finder to decide. (*Chandris, supra,* 132 L.Ed.2d at p. 338.)

There was evidence here that plaintiff had a connection substantial in duration and nature to the *Arctic Carolyn* and other identifiable vessels in navigation. His assignment to the San Diego sewer project was expected to last approximately one year, with dives from the *Arctic Carolyn* and two seagoing barges. Even if they are not used primarily for transportation of people or goods, such craft may constitute vessels for Jones Act purposes. (See, e.g., *Gizoni* v. *Southwest Marine Inc.* (9th Cir. 1995) 56 F.3d 1138, 1142; *Blanchard* v. *Engine & Gas Compressor Serv.* (5th Cir. 1978) 575 F.2d 1140, 1142; *Boatel, Inc.* v. *Delamore* (5th Cir. 1967) 379 F.2d 850, 853; *Producers Drilling Company* v. *Gray* (5th Cir. 1966) 361 F.2d 432, 437.) Accordingly, we conclude the issue of plaintiff's status was for the jury, and that substantial evidence supports its verdict.

II

Plaintiff also challenges the new trial order. A court cannot grant a new trial on the ground of excessive damages unless it is convinced from the entire record, including reasonable inferences therefrom, that the jury should have reached a different decision. (Code Civ. Proc.,[2] § 657, subd. 7.) An order for new trial must state both the grounds for granting the motion and its reasons for granting the motion upon those grounds. (*Ibid.*) The purpose of the specification is to encourage careful deliberation by the court before granting a new trial, and the

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[2] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

creation of a sufficiently precise record to permit meaningful appellate review. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 931.) Reasons do not have to be elaborate. " '[A] concise but clear statement of the reasons why [the court] finds one or more of the grounds of the motion applicable' " to the case before it suffices. (*Id.* at p. 931-932, internal citations omitted.) The requirements of section 657 are also applicable to conditional new trial orders, in which a court grants a new trial on the ground of excessive damages unless the party in whose favor a verdict has been rendered consents to a reduction of the damages by an amount the court determines is fair and reasonable. (*Neal, supra*, at p. 931; § 662.5.)

In its order for new trial the court stated, "Plaintiff's injury was extremely painful and he suffered grievously during the extended course of treatment. The court nevertheless concludes that the assessment for pain and suffering is excessive at any figure above $500,000." Motions for new trial are measured by the abuse of discretion standard and are reversed only if a manifest and unmistakable abuse clearly appears. (*Jiminez* v. *Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) Insofar as this order contains *no* reasons for concluding the damages were excessive, it fails to comply with statutory requirements and thus constitutes an abuse of discretion. (See *Stevens* v. *Parke, Davis & Co.* (1973) 9 Cal.3d 51, 59-60; *Mercer* v. *Perez* (1968) 68 Cal.2d 104, 116; *Bigboy* v. *County of San Diego* (1984) 154 Cal.App.3d 397, 404; *Oberstein* v. *Bisset* (1976) 55 Cal.App.3d 184, 187.)

DISPOSITION

The judgment notwithstanding the verdict and the order granting a new trial are reversed, and the matter remanded with directions to enter judgment in accordance with the special verdict. Costs to Gil Hoeflich.

HANING, J.

We concur.

PETERSON, P.J.

ELY, J.*

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*Judge of the Superior Court of Solano County, sitting under assignment by the Chairperson of the Judicial Council.

OFFICE OF THE CLERK
CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION 5

A072913

HOEFLICH, GIL

v.

MARTECH INTERNATIONAL, INC., *et al.*

San Francisco County Super. Ct. No. 121995

REMITTITUR

I, Ron D. Barrow, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on July 23, 1996 has now become final.

Witness my hand and the Seal of the Court affixed at my office this Oct. 21, 1996.

RON D. BARROW
Clerk of the Court

R. H. SANDVIK
Deputy Clerk

OFFICE OF THE CLERK
CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION 5

A069336

HOEFLICH, GIL

v.

MARTECH INTERNATIONAL, INC., *et al.*

San Francisco County Super. Ct. No. 950673

REMITTITUR

I, Ron D. Barrow, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on July 23, 1996 has now become final.

Witness my hand and the Seal of the Court affixed at my office this Oct. 21, 1996.

RON D. BARROW
Clerk of the Court

R. H. SANDVIK
Deputy Clerk

[SEAL]

[Filed Aug. 13, 1996]

CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT
DIVISION 5

A069336

San Francisco County Super. Ct. No. 950673

HOEFLICH, GIL

v.

MARTECH INTERNATIONAL, INC., *et al.*

BY THE COURT:

The petition for rehearing is denied.

Date: Aug. 13, 1996

/s/ Peterson, P.J.
D.J.

[Filed Oct. 20, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., MARTECH USA INC, POINT LOMA CONSTRUCTORS, A Joint Venture, between Morrison Knudsen Corp. & Manson Construction & Engineering Co., MORRISON-KNUDSEN CORP., and MANSON CONSTRUCTION & ENGINEERING CO., RED & WHITE DIVING, INC., and DOES 1 THROUGH 25,

Defendants.

FINAL JUDGMENT

This action came on regularly for trial by jury on December 12, 1994, in Department X-1, Room 479, of the above entitled Court, the Honorable Winslow Christian presiding. The parties agreed before trial that this action should be dismissed as to defendant MARTECH INTERNATIONAL, INC., and the action against MARTECH INTERNATIONAL, INC. was dismissed. At the close of plaintiff's case, the Court directed a verdict in favor of defendants POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison Knudsen Corp. and Manson Construction & Engineering Company, MORRISON KNUDSEN CORP., and MANSON CONSTRUCTION & ENGINEERING COMPANY. The Court granted the mo-

tion of defendant MARTECH U.S.A., INC. for judgment notwithstanding the verdict.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff GIL HOEFLICH take nothing by reason of his complaint and that judgment be entered in favor of defendants MARTECH INTERNATIONAL, INC., POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison Knudsen Corp. and Manson Construction & Engineering Company, MORRISON KNUDSEN CORP., MANSON CONSTRUCTION & ENGINEERING COMPANY, and MARTECH U.S.A., INC., and that said defendants recover costs and disbursements from the plaintiff, Gil Hoeflich, in an amount to be determined by the Court in accordance with a Memorandum of Costs to be filed by said defendants.

Dated: October 17, 1995

/s/ Winslow Christian
WINSLOW CHRISTIAN
Judge of the Superior Court,
Assigned

[Filed Mar. 1, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

Case No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., *et al,*

Defendants.

ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, IN THE ALTERNATIVE, CONDITIONALLY GRANTING MOTION FOR NEW TRIAL

Background

Plaintiff was employed by defendant as a deep-sea diver for the purpose of performing various tasks connected with the extension of the City of San Diego's sewer outfall on the ocean floor off-shore from Point Loma. The whole effort comprised work planned to extend over many months. The first task assigned to Plaintiff was measurement and cleaning of the end of the existing pipe in preparation for attaching many pieces of concrete pipe in order to move the point of discharge farther from the shore. Plaintiff was hired for his job through his union and drove from his home in Santa Barbara to stay at a San Diego motel.

On the first morning of the job plaintiff went out to the seagoing tug Arctic Carolyn, owned by defendant. Before plaintiff's arrival the tug had been moored with several

anchors to hold it motionless directly above the end of the sewer outfall. Plaintiff descended to the ocean floor and, while working there, severely injured his foot through accidental misuse of a "water-blaster" tool.

Discussion

For this injury plaintiff is potentially covered by the tort-like remedies of the Jones Act if he is found to have been a crew member of a vessel in navigation. If he is not a Jones Act seaman, he is covered by the workers' compensation type of remedies afforded by the Longshore and Harbor Workers Act. Plaintiff has pursued Jones Act remedies, but the LHWA remedies are still available.

Trial by jury resulted in a verdict (in the form of jury responses to pertinent interrogatories) awarding an aggregate sum of $1,753,944 reduced by 25% on the jury's assessment of proportional contribution to causation by negligence on the part of plaintiff.

Defendant has moved for judgment notwithstanding the verdict and for new trial. A further motion by defendant, to vacate or correct the verdict or the judgment, need not be reached.

Fundamental to the verdict is the jury's finding that plaintiff was a Jones Act seaman; *i.e.*, he was injured while he was a member of the crew of a vessel in navigation. The court has concluded that the finding is not supported by any substantial evidence. Although the Arctic Carolyn was a tug capable of ocean navigation, she was out of navigation and was moored, with the sole mission of serving as a dive platform, before plaintiff boarded her. That mission could equally well have been performed by a barge incapable of navigation. If plaintiff had been injured while helping the tug to move to its destination or to anchor there, Jones Act status would have been evident even though plaintiff was a diver rather than a member of the ship's company. But the tug was out of navigation

before plaintiff arrived, and he did not further the tug's mission of providing a dive platform. Rather, he undertook his own different mission of working on the ocean floor. The court concludes that plaintiff was, as a matter of law, not a Jones Act seaman.

Because the ruling on Jones Act status may be challenged on appeal, it is appropriate to consider the motion for new trial. There was indeed, as defendant contends, misconduct in the closing argument of counsel for plaintiff:

> a. Counsel improperly assured the jury of his own belief in the veracity of plaintiff.
>
> b. Counsel asked the jurors to "walk a mile in [plaintiff's] shoes" when assessing pain and suffering.
>
> c. Although punitive damages are not a factor in the case, counsel broadly and improperly hinted at an exemplary or punitive function for general damages, referring to evil persons responsible for the death of astronaut Christa McAuliffe and to the deterrent effect of jury awards in auto safety litigation. The apparent implication was that comparable evil on the part of defendant deserved punishment in the form of a high award of general damages.

Although these statements were improper, objections were promptly and sharply sustained; the court has concluded that the verdict was probably not affected. Therefore, a new trial need not be granted on the basis of attorney misconduct.

The defense challenges all three elements of the damage award:

Lost earnings	$ 634,944
Future medical expense	119,000
Pain and suffering	1,000,000
	$1,753,944
Less 25% for plaintiff's contributory negligence	- $1,315,458 net

The award for lost earnings has adequate support in the evidence; it is sustained, except that the court concludes that defendant is entitled to credit in the amount of $29,700, against lost earnings, for payments already made. The award for future medical expenses is also sustained. Plaintiff's injury was extremely painful and he suffered grievously during the extended course of treatment. The court nevertheless concludes that the assessment for pain and suffering is excessive at any figure above $500,000.

The other challenges asserted by defendant are unmeritorious or need not be reached.

Rulings

1. The motion for judgment notwithstanding the verdict is granted on the ground no substantial evidence supports the determination of the jury that plaintiff was a Jones Act seaman.

2. Alternatively, the motion for new trial is conditionally granted on the ground of excessive damages. If plaintiff consents to a reduction of the damage award to give defendant credit for $29,700 already paid toward lost earnings and to assess pain and suffering at $500,000, the motion for new trial is denied. The aggregate net award after such reduction shall give effect to the finding of $25% contributory negligence.

3. In all other respects defendant's motions are denied.

DATED: February 28, 1995.

/s/ Winslow Christian
WINSLOW CHRISTIAN

[Filed Jan. 13, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Case No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., MARTECH USA INC., POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison-Knudsen Corp. and Manson Construction & Engineering Co., MANSON CONSTRUCTION & ENGINEERING CO., and DOES 1 THROUGH 25,

Defendants.

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial by jury on December 12, 1994, in Department X-1, Room 479, of the above-entitled Court, the Honorable Winslow Christian presiding. The plaintiff appeared in person and by his attorney, John R. Hillsman, of McGuinn, Hillsman & Palefsky, and the defendant, MARTECH USA, INC., appeared by George Koelzer and Matthew Kesner of Lane Powell Spears & Lubersky.

A panel of twelve persons was impaneled and sworn. Witnesses were sworn and testified. After being duly instructed by the Court, the jury deliberated, and thereafter duly returned the Special Verdict, a true copy of which is attached hereto as Appendix A.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered

in favor of the plaintiff Gil Hoeflich in accordance with that Special Verdict; that plaintiff Gil Hoeflich recover costs and disbursements from defendant Martech USA, Inc. in an amount to be determined by the Court, under C.C.P. §§ 1032 and 998; and that he receive interest thereon at the rate of 10% per annum.

Dated: 13 January 95

/s/ Christian
THE HONORABLE WINSLOW CHRISTIAN,
Justice of the California Court of Appeal,
Retired, Judge of the Superior Court,
Pro Tempore

[Filed Jan. 5, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY SAN FRANCISCO

Case No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., MARTECH USA INC., POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison-Knudsen Corp. and Manson Construction & Engineering Co., MANSON CONSTRUCTION & ENGINEERING CO., and DOES 1 THROUGH 25,

Defendants.

SPECIAL VERDICT FORM

We, the jury in the above-entitled case, find the following special verdict on the following questions submitted to us:

QUESTION NO. 1:

1. Was the Plaintiff a Jones Act seaman?

ANSWER: Yes 12

No 0

(If you have answered question number 1 "yes," go on to question number 2. If you have answered question number 1 "no," go directly to question number 6).

QUESTION NO. 2:

2. Was defendant Martech USA guilty of Jones Act negligence?

ANSWER: Yes 12

No 0

(If you have answered question number 2 "yes," go on to question number 3. If you have answered question number 2 "no," go directly to question number 4.)

QUESTION NO. 3:

3. Was that Jones Act negligence a legal cause of damage to the Plaintiff?

ANSWER: Yes 12

No 0

(Go on to question number 4.)

QUESTION NO. 4:

4. Was the ARCTIC CAROLYN unseaworthy?

ANSWER: Yes 12

No 0

(If you have answered question number 4 "yes," go on to question number 5. If you have answered question number 4 "no," go directly to question number 6.)

QUESTION NO. 5:

5. Was that unseaworthiness a legal cause of damage to the Plaintiff?

ANSWER: Yes 12

No 0

(Go on to question number 6.)

QUESTION NO. 6:

6. Was defendant Martech USA guilty of vessel owner negligence?

ANSWER: Yes 2

No 10

(If you have answered question number 6 "yes," go on to question number 7. If you have answered both question numbers 1 and 6 "no," sign and date your verdict form and return it to the clerk. If you have answered question number 6 "no," but have answered question numbers 3 or 5, or either of them "yes," go directly to question number 8.)

QUESTION NO. 7:

7. Was that vessel owner negligence a legal cause of damage to the Plaintiff?

ANSWER: Yes

No

(Go to question number 8.)

QUESTION NO. 8:

8. Without taking into consideration the reduction of damages due to the comparative fault of the plaintiff, if any, what do you find to be the total amount of damages suffered by the plaintiff?

ANSWER:	(a) Lost Earnings	$ 634,944
	(b) Future Medical Expenses	$ 119,000
	(c) Pain and Suffering	$1,000,000
	TOTAL	$1,753,944

(Go on to question number 9.)

QUESTION NO. 9:

9. Was there comparative negligence on the part of the plaintiff?

ANSWER: Yes 12
No 0

(Go to question number 10.)

QUESTION NO. 10:

10. Was the plaintiff's comparative negligence a legal cause of his damages?

ANSWER: Yes 12
No 0

(Go to question number 11.)

QUESTION NO. 11:

1. Assuming that 100% represents the total causes of the plaintiff's damages, what percentage of this 100% is attributable to the fault of defendant Martech USA, and what percentage of this 100% is attributable to the fault of the plaintiff?

ANSWER: To defendant Martech USA 75%
To plaintiff Hoeflich 25%
Total 100%

(Sign and date you verdict form and return it to the clerk.)

Dated: 1-5-95

/s/ [Illegible]
Foreperson

DATE	JOB	LOCATION	DIVED FROM	OWNED BY
9-92	Point Loma Project	San Diego, CA	M/V ARCTIC CAROLYN	Martech USA, Inc.
1-23-92	"Durocher"	Shore	Shore	Martech
2-17-92	Unocal	Mandalay	Beach	Not Martech
2-7-92	"Durocher"	Near Shore	Barge	Martech
2-26-90	Boise Cascade	Minnesota	Shore and non-self-propelled barge	Not Martech
2-1-90	Riedel	Lasflores	Beach	Not Martech
6-23-89	Unocal	Platform	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
6-1-89	PG&E	Iron Canyon Dam	Dam	Not Martech
5-6-89	Unocal	Platform C	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
4-11-89	Unocal	Vandenburg Air Force Base	Surfboard	
12-12-88	PG&E	Pit River, Burney, CA	Pit 3	Not Martech
12-12-88	PG&E	Pit River, Burnen, CA	Truck (not a vessel in navigation)	
10-30-88	Unocal	Vandenburg Air Force Base	Beach	Not Martech
7-25-88	Texaco	P/L Removal - Beach	Toby Tide	Not Martech

25a

EXHIBIT E1

6-17-88	Texaco	Helen	D/B Martinez (non-self-propelled barge)	Not Martech
1-26-88	ARCO	Platform Holly	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
3-1-89	Salt River	Horse Mesa Dam	Horse Mesa Dam	Not Martech
2-07-89	Unocal	Vandenburg Air Force Base	Beach and vehicle with balloon tires	Not Martech
7-87	L/P	Samoa	Effluent Outfall	Not Martech
3-03-87	Unocal	Platform A	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
While working for Martech in CA		California	Piers; Beaches; Vessels time-chartered by Martech; Dams; Surfboards; Non-Selfpro-pelled barges (deposition transcript 175-77)	Not Martech

EXHIBIT E2

[Excerpts from Reporter's Transcripts of Proceedings
Volumes II, III, V, VI, VII and VIII]

[167] IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

BEFORE THE HON. WINSLOW CHRISTIAN, ASSIGNED

No. 950673

GIL HOEFLICH,
Plaintiff,

vs.

MARTECH INTERNATIONAL, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME II

December 13, 1994

* * * *

[259] Q. And did you remain steadily employed with Martech throughout your employment in the dive industry, or did you work for other employers?

A. [PLAINTIFF] In the Gulf of Mexico, primarily Martech. When I came out to California it was, I'd have to say, around 99 percent Martech.

Q. When did you come to California?

A. I believe that was in '85. Around there.

Q. And when you worked for Martech, what types of work did you do for them? What were your jobs with Martech?

A. Both in the Gulf and in California?

Q. Let's talk about California. For example, did you ever work in the shop?

A. Yes. Loading out jobs, working on some of their equipment.

Q. You were present when John Sabo testified?

A. Yes.

Q. He told us that he worked for Martech as a diver/mechanic.

A. Yes.

Q. You recall that he indicated he worked steadily for the company in the shop between dive jobs. Was that your experience?

A. No.

* * * *

[398] VOLUME III

December 14, 1994

* * * *

[437] THE COURT: Come to side bar.

MR. KOELZER: In fairness to all concerned, I want to do that.

(A discussion was had at the bench, not within hearing of the court reporter.)

MR. HILLSMAN: Thank you very much. That's all I have.

Thank you, Your Honor.

MR. KOELZER: Is 27 in evidence?

THE COURT: No. It was marked for identification.

MR. KOELZER: Is it going to be offered?

THE COURT: So far, it hasn't been.

MR. KOELZER: I am trying to inquire of my adversary through the court.

MR. HILLSMAN: I would be happy to make an offer of proof now.

THE COURT: It is not in evidence now.

You are not under pressure to offer it.

You may proceed.

MR. KOELZER: I shall be as prompt as I can.

CROSS-EXAMINATION

MR. KOELZER: Q. Mr. Roche, in September of 1992, Martech owned several vessels; is that correct?

A. [TED ROCHE, V.P. Martech, USA, Inc.] Yes. [438] Q. And one of them was the Arctic Carolyn, wasn't it?

A. That is correct.

Q. Was the Arctic Carolyn certified, inspected by the Coast Guard?

A. Yes.

MR. KOELZER: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. KOELZER: Defendants' Exhibit F, Your Honor.

THE COURT: Very well.

MR. KOELZER: It will save time if you have that in front of you.

Q. Look at the certificate. When was the Arctic Carolyn certified by the Coast Guard prior to the Hoeflich accident? Upper right corner.

A. 21 May '92.

Q. A little more than three months before the accident; is that correct?

A. That is correct. It was originally certificated long before that.

Q. 1978, when she was built?

A. Right.

Q. And by certificated by the Coast Guard, you mean it is inspected on a regular schedule promulgated by the Coast Guard?

A. That is correct.

[439] Q. Like your license plate on your car, they have to be renewed?

A. It is a little more lengthy than that.

Q. Of course, it is. But it has to be renewed because of the service the boat is being put to?

A. Right. If you have a vessel and you want to maintain a certificate, you have to go through numerous inspections. Besides the life-saving equipment, there is annual drydocking required.

Q. Lots of things.

A. Right. Very expensive.

Q. In the certificate of inspection, does the Coast Guard set forth the crew of the vessel?

A. Yes. The manning, yes.

Q. What was the crew of the vessel as required by the Coast Guard?

A. The minimum crew is a five-man crew.

Q. Consisting of what?

A. One licensed master.

Q. Stop.

Was Gil Hoeflich the licensed master of the Arctic Carolyn?

A. No.

Q. What next?

A. Licensed mate.

Q. How many?

A. One.

Q. And was Gil Hoeflich a licensed mate?

[440] A. No.

Q. What next?
A. One chief engineer.
Q. Was Gil Hoeflich a chief engineer?
A. No.
Q. What else?
A. One ablebodied seaman.
Q. Was Gil Hoeflich an ablebodied seaman on the Arctic Carolyn?
A. No.
Q. What else?
A. One ordinary seaman.
Q. Was Gil the ordinary seaman?
A. No.
Q. Did that comprise the entire crew of the Arctic Carolyn?
A. Yes.
Q. Each of these crew members had papers?
A. Fully licensed, yes.
Q. You have known Mr. Hoeflich approximately ten years; is that right?
A. That is correct.
Q. You worked with him on many occasions?
A. That is correct.
Q. Did you ever know Gil Hoeflich to have Coast Guard papers?
A. No.
Q. Now, did Martech own other vessels?
[441] A. Yes.
Q. What else?
A. We owned two tugs.
Q. Stop right there.
A. Okay.
Q. Were those tugs certified by the Coast Guard?
A. No, not inspected. They are licensed crews.
Q. The people who comprised the crew had Coast Guard licenses?
A. Yes.

Q. Was Gil ever a member of the crew of either of those tug boats?

A. No.

Q. Ever?

A. No, sir.

Q. What other vessel did Martech own?

A. We owned another tug and an unprepped barge. Two. One was a tank barge for carrying liquid product, and one a construction barge.

Q. The tank barge and the crew barge were unmanned vessels; is that correct?

A. Yes.

Q. They didn't have a crew.

A. No.

Q. Am I correct?

A. While they were underway, they did not have [442] a crew on board.

Q. And did they also own a crew boat?

A. Yes.

Q. Did the crew boat have a crew?

A. Yes.

Q. Licensed people?

A. Yes.

Q. Was Gil Hoeflich ever a member of the crew of the crew boat?

A. No.

Q. Another tug boat?

A. Lorie Ann.

Q. Was Gil Hoeflich a member of the crew of that boat?

A. No.

Q. Would you agree that never in his employment with Martech was he never a member of crew of a vessel owned by Martech?

A. That is true.

Q. Would you agree that the majority of the dive operations were not from these vessels or other vessels;

most of the diving done by Martech was not done off vessels?

A. The Carolyn was new to the coast. We purchased her and brought her down. In fact, that was the first diving operation ever conducted from that vessel.

* * * *

[724] VOLUME V

December 19, 1994

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FURTHER RECROSS-EXAMINATION

Q. To your knowledge, the only connection Hoeflich ever had with the Arctic Carolyn was the diving that he did in connection with the Point Loma job, the diving he did on the afternoon of September 9, 1992; is that correct?

A. [ED THOMAS, Martech Diving Supervisor] That is correct.

* * * *

[913] Q. Sir, did you consider yourself to be a member of the crew of the Arctic Carolyn?

A. [PLAINTIFF] No.

* * * *

[934] MR. HILLSMAN: In my view, the cutoff is [935] the plaintiff's assignment at the time of the accident.

In this circumstance we take the position a Jones Act seamans status sinks or swims with assignment at the time of the accident.

Keith vs. S.S. Goldstone, 81 Cal.App.3d 699, the language at 704, in this Court. California courts are obliged to follow the Ninth Circuit rule. Where there is a conflict among the circuits, the Court will find the rule is that the fleet seaman doctrine does not apply, that a seaman's status is determined solely from assignment at the time of the injury.

* * * *

[939] VOLUME VI

December 20, 1994

* * * *

[951] You came to the west coast in, I believe it was, 1985; is that correct?

A. [PLAINTIFF] Sounds right.

Q. The great majority of your diving work you did for Martech on the west coast was not from the Arctic Carolyn, the tug boat, the crew boat, or the barges; most was from other sorts of vessels or nonvessels, wouldn't you agree?

A. Yes. They didn't buy those boats until years later.

Q. Wouldn't you agree most of your dives for Martech was not from these vessels I just enumerated? Isn't that true?

A. Yes.

* * * *

[954] Q. You never have held papers, Coast Guard papers, as a seaman or a master or a mate or anything like that; is that correct?

A. [PLAINTIFF] I do now.

Q. I said perhaps I am—forgive me. I phrased badly. Prior to September 9, 1992, did you ever hold papers as an ablebodied seaman, an ordinary seaman, a mate, a master, any other sort of papers issued by the Coast Guard?

A. No.

* * * *

[955] Q. Perhaps my question wasn't clear. Prior to September 9, 1992, did you have any sort of Coast Guard papers such as I described? Yes or no.

A. [PLAINTIFF] No.

* * * *

[1114] VOLUME VII

December 21, 1994

* * * *

[1120] [PLAINTIFF'S COUNSEL] If Your Honor does not feel that that is sufficient connection—although

I believe, as I will explain in a moment, it is—the evidence is also clear that had he not been injured, this was a key employee who would have continued to work aboard the vessels Haakon and Betty L, if the permanent assignment requirement is indeed a factor in dive cases.

I respectfully submit it isn't. I cite the seminal Fifth Circuit Appellate decision of Wallace v. Oceaneering. The Court will find the key language at 727 F.2d 436, where it was held that a commercial diver who embodies the traditional and inevitable task of navigation has the legal protections of a seaman when a substantial part of his duties are performed on vessels. It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes a diver a seaman.

* * * *

[1172] VOLUME VIII

January 3, 1995

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[1280] [DEFENDANT'S COUNSEL] One of the things you look for is the course of work over the years that Mr. Hoeflich worked for Martech. There is an Exhibit E put into evidence. And I have a copy of it. You will have this in the jury room. It is a list of the various jobs, with the dates, that Mr. Hoeflich had when he was working for Martech.

You are asked to accept that he was at all times a crew member, or was a crew member, rather, on September 9, 1992.

And you look at his work history.

On the job in Point Loma he was diving from the Arctic Carolyn the day the accident happened. True.

Earlier that year, on a job called Derocher, he dove from the shore. In February '92, working for Unocal,

he dove from the beach. Again, in February, he dove from a barge. On the Boise Cascade job, he dove from shore and a non-self-propelled barge. From the beach. A fixed platform. From a dam in June of '89, when doing work for PG&E. In May of '89, working for Unocal, [1281] a fixed platform. April of '89, dove from a surf board. PG&E, from a truck, in December of '88. In October of '88, Unocal, from a beach. In July of '88 working for Texaco, from something called Toby-Tide, non-self-propelled barge. A fixed platform. From a dam in '89. From a beach and a vehicle with balloon tires, hardly a vessel. In '87, he dove from an effluent outfall. From a fixed platform. While working for Martech in California, from piers, beaches, vessels, time-chartered by Martech, that is, to say Martech didn't own the vessels, dams, surfboards, non-self-propelled barges.

All of this is in evidence.

Mr. Hoeflich, whatever he was, was not a member of the crew of the Arctic Carolyn.

* * * *

[Filed Jul. 31, 1995]

COURT OF APPEAL
FIRST APPELLATE DISTRICT
STATE OF CALIFORNIA

AO 69336 DIV 5
SCN 950673

GIL HOEFLICH,
Plaintiff/Appellant/
X-Respondent

VS

MARTECH INTERNATIONAL, INC.,
Defendant/Respondent/
X-Appellant

CLERK'S TRANSCRIPT ON APPEAL

From a Judgment of the Superior Court
of the State of California,
In and for the City and County of San Francisco

Appeal Filed on 3-8-95 X-Appeal Filed 3-28-95

HONORABLE WINSLOW CHRISTIAN

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* * * *

[165] Q. Did Martech in California have a fleet of vessels that it owned?

A. [PLAINTIFF] They did, yes.

Q. Which vessels did Martech in California own?

A. The ARCTIC CAROLYN. They have a tug boat, I can't remember their name; a crew boat; a barge or two; a variety of inflatable boats. And I think that's about all I know of right now.

Q. You would say, though, that less than 50 percent of your diving activities were performed from those vessels, correct?

A. From the Martech vessels?

Q. Yeah.

MR. HILLSMAN: During what time period are we talking about?

MR. KESNER: While he's in California.

MR. HILLSMAN: The question, as it goes to you, Gil, is was less than 50 percent of your overall dive activities for Martech in California waters from those [166] vessels.

THE WITNESS: I would say so, yes.

MR. KESNER: Q. Were less than 25 percent of your dives made from those vessels?

MR. HILLSMAN: I'm sorry. With the same parameters?

MR. KESNER: Yes.

THE WITNESS: I would have to say so, yes, because they haven't had their fleet for that many years.

* * * *

TITLE 46 APPENDIX. SHIPPING
CHAPTER 18. MERCHANT SEAMEN PROTECTION AND RELIEF

46 USCS Appx § 688 (1996)

§ 688. Discovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

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